No. 81-2119

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IN THE

Supreme Court of the United States

October Term, 1981

MARIA MOE, RAOUL ROE, RICARDO ROE, an infant, by his father, RAOUL ROE, CRISTINA COE and PEDRO DOE, on behalf of themselves and all other persons similarly situated,

Cross-Respondents,

against

DAVID DINKINS, individually and as City Clerk of New York City, on behalf of himself and all town and city clerks in New York State,

Defendants,

and

DAVID AXELROD, individually and as New York State Commissioner of Health,

Cross-Petitioner.

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Dated: New York, New York
May 13, 1982

Questions Presented

1. Whether review should be granted of the novel rulings below allowing plaintiffs and intervenors to conceal their identities from State defendant, thus preventing the State defendant from preparing a full defense against class certification and on the merits which might have avoided constitutional questions?

2. Whether review should be granted of the rulings below denying abstention although the statute in question contains relevant, major ambiguities under New York case law, one of which has been identified by New York's highest court and another by a trial court?

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CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Cross-petitioner Axelrod respectfully prays that if a Writ of Certiorari is issued in Docket No. 81-6511 on the petition of "Cristina Coe" and "Pedro Doe" (hereinafter "intervenors"),* to review the judgment of the United States Court of Appeals for the Second Circuit filed on January 11, 1982, that a further Writ of Certiorari be issued on his cross-petition in this Docket to review said judgment. The cross-petition is filed as a precaution to assure that certain defenses may be raised in support of the judgment.**

Opinions Below

In the initial judgment entered on July 17, 1980, upon an unpublished decision dated July 10, 1980 (Appendix to this cross-petition), the United States District Court for the Southern District of New York dismissed the complaint filed by plaintiffs Maria Moe and Raoul and Ricardo Roe (hereinafter "plaintiffs"). District Judge Motley agreed with State defendant's position that abstention was appropriate under *Railroad Commission* v. *Pullman Co.*, 312 U.S. 496 (1941). She found that several alternative constructions might be applied by the State courts to Domestic Relations Law (DRL) § 15, the New York stat-

* Intervenors were allowed to intervene under pseudonyms as plaintiffs and class representatives by the District Court's order entered on August 17, 1981. The original pseudonymous plaintiffs, "Maria Moe," "Raoul Roe" and "Ricardo Roe," did not petition for certiorari.

** The State defendant maintains that a reversal in his favor on any of the issues raised on the cross-petition would only offer a different ground for the judgment of dismissal, rather than vary the judgment itself, and that the issues could therefore be raised as defenses to the petition without a cross-petition. Stern & Gressman, *Supreme Court Practice*, § 6.34 at 478 (5th Ed. 1978). This cross-petition is filed, however, to avoid any question as to raising those issues solely as defenses.

ute which delineates the circumstances under which parental consent to a minor's marriage is required, in avoidance of the constitutional issues plaintiffs had raised. In a judgment and decision dated December 9, 1980, and published at 635 F.2d 1045 (Appendix "D" to the petition), the United States Court of Appeals for the Second Circuit (*Kaufman*, C.J.) reversed, stating that DRL § 15 was clear and that New York courts had always interpreted the statute literally.

On remand, District Judge Motley entered an order on June 29, 1981, upon an unpublished decision of the same date (Appendix "C" to the petition), certifying a plaintiff class consisting of all New York persons who wish to marry but cannot do so because of a lack of parental consent and a defendant class of all New York town and city clerks. The district court refused, however, to certify a plaintiff subclass of children born or about to be born out of wedlock to such minors.

By an order entered on August 17, 1981, upon a decision of the same date published at 533 F. Supp. 623 (Appendix "B" to the petition), District Judge Motley granted the motion of Cristina Coe and Pedro Doe to intervene as party plaintiffs and additional class representatives and to proceed without guardians *ad litem* and under pseudonyms. The same order denied plaintiffs' motion for summary judgment and granted summary judgment in defendants' favor. Judgment was entered on August 25, 1981. The district court held that the parental consent requirement was not unconstitutional. Rather, the court found that the requirement is rationally related to the State's legitimate interests in fostering mature decisions regarding the proposed marriage of a minor, in preventing unstable marriages, and in

supporting the fundamental right of a parent to act in the best interests of his or her child free from State restraint.

By judgment and *per curiam* decision of January 11, 1982, published at 669 F.2d 67, the court below affirmed in all respects. It generally adopted the district court's reasoning.

Jurisdiction

The Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

The judgment and opinion of the Court of Appeals for the Second Circuit were filed on January 11, 1982. State defendant received the petition of Cristina and Pedro on April 13, 1982. This cross-petition is timely filed, pursuant to Rule 19.5, within thirty days of the latter dat .

Constitutional Provisions and Statutes Involved

The Sixth Amendment to the United States Constitution provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him . . . .

The Fourteenth Amendment to the United States Constitution provides in relevant part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

New York Domestic Relations Law § 13 (McKinney 1977) provides in relevant part:

> It shall be necessary for all persons intended to be married in New York state to obtain a marriage license . . . .

New York Domestic Relations Law § 15 (McKinney 1977) provides in relevant part:

> 2. . . . If it shall appear upon an application of the applicants as provided in this section or upon information required by the clerk that the man is under eighteen years of age and is not under sixteen years of age, or that the woman is under the age of eighteen and not under fourteen years of age, then the town or city clerk before he shall issue a license shall require the written consent to the marriage from both parents of the minor or minors or such as shall then be living, or if the parents of both are dead, then the written consent of the guardians of such minor or minors. If one of the parents has been missing and has not been seen or heard from for a period of one year preceding the time of the application for the license, although diligent inquiry has been made to learn the whereabouts of such parent, the town or city clerk may issue a license to such minor upon the sworn statement and consent of the other parent. If the marriage of the parents of such a minor has been dissolved by decree of divorce or annulment, the consent of the parent to whom the court which granted the decree has awarded custody of such minor shall be sufficient. If there is no parent or guardian of the minor or minors living to their knowledge then the town or city clerk shall require the written consent for the marriage of the person under whose care or government the minor or minors may be before a license shall be issued.

> If a parent of such minor has been adjudicated an incompetent, the town or city clerk may issue a license to such minor upon the production of a certified copy of such judgment so determining and upon the written consent of the other parent. If there is no other parent whose consent is required by this section, then, the town or city clerk shall require the written consent of the guardian of such minor or of the person under whose care or government the minor may be before a license shall be issued . . . .
>
> 3. If it shall appear upon an application for a marriage license that the woman is under the age of sixteen years and is not under fourteen years of age, the town or city clerk shall require, in addition to the consents provided in this section, the written approval and consent of a justice of the supreme court or of a judge of the family court, having jurisdiction over the town or city in which the application is made, to be attached to or endorsed upon the application, before the license is issued . . . .

New York Domestic Relations Law § 15-a (McKinney 1977) provides in relevant part:

> Any marriage in which the man is under the age of sixteen years or in which the woman is under the age of fourteen years is hereby prohibited . . . .

New York Social Services Law § 145 (McKinney 1976) provides in relevant part:

> 1. Any person who by means of a false statement or representation, or by deliberate concealment of any material fact, or by impersonation or other fraudulent device, obtains or attempts to obtain, or aids or abets any person to obtain public assistance or care to which he is not entitled, or does any wilful act designed to

> interfere with the proper administration of public assistance and care, shall be guilty of a misdemeanor, unless such act constitutes a violation of a provision of the penal law of the state of New York, in which case he shall be punished in accordance with the penalties fixed by such law .... Whenever a social services official has reason to believe that any person has violated any provision of this section, he shall promptly refer the facts and evidence available to him to the appropriate district attorney or other prosecuting official who shall immediately evaluate the facts and evidence and take appropriate action.

New York Penal Law § 260.05 (McKinney 1980) provides in relevant part:

> A person is guilty of non-support of a child when, being a parent, guardian or other person legally charged with the care or custody of a child less than sixteen years old, he fails or refuses without lawful excuse to provide support for such child when he is able to do, or becomes unable to do so, when, though employable, he voluntarily terminates his employment, voluntarily reduces his earning capacity or fails to diligently seek employment.
>
> Non-support of a child is a class A misdemeanor.

New York Penal Law § 260.10 (McKinney 1980) provides in relevant part:

> A person is guilty of endangering the welfare of a child when:
>
> 1. He knowingly acts in a manner likely to be injurious to the physical, mental or moral welfare of a male child less than sixteen years old or a female child less than seventeen years old or directs or authorizes such

child to engage in an occupation involving a substantial risk of danger to his life or health; or

2. Being a parent, guardian or other person legally charged with the care or custody of a child less than eighteen years old, he fails or refuses to exercise reasonable diligence in the control of such child to prevent him from becoming an "abused child," a "neglected child," a "juvenile delinquent" or a "person in need of supervision," as those terms are defined in articles ten and seven of the family court act.

Endangering the welfare of a child is a class A misdemeanor.

Statement of the Case

A. Statutes

Under DRL § 15, boys aged sixteen or seventeen and girls aged fourteen through seventeen who wish to marry need the consent of their competent, living, custodial parents, guardians or persons caring for them. For girls fourteen or fifteen years old, judicial approval is also required. Under DRL § 15-a, marriages by younger minors are prohibited.

B. Plaintiffs Maria Moe, Raoul Roe and Ricardo Roe

The instant case was originally brought by plaintiffs Maria Moe, Raoul Roe and Ricardo Roe. They obtained permission to proceed under pseudonyms by *ex parte* motion on March 19, 1980. Plaintiffs refused numerous requests for disclosure of their true identities. They first provided copies of the *ex parte* pseudonym motion papers, and only in redacted form, over a year later, on June 2, 1981, in reply

to State defendant's opposition to plaintiffs' motion for summary judgment.

Ms. Moe alleged that she was born on March 2, 1965, and Mr. Roe that he was born March 9, 1962. Accordingly, she was fifteen years old and he eighteen when this action commenced. Their son, Ricardo Roe, allegedly was born on August 21, 1979.

Ms. Moe and Mr. Roe asserted that they wished to marry for several reasons, including the legitimization of Ricardo Roe. They claimed they could not marry because Mrs. Moe, Maria's mother, refused to consent allegedly because she wished to obtain public assistance illegally by fraudulently claiming that Ms. Moe was still a member of her household.* Plaintiffs asserted that the parental consent requirement of DRL § 15 violated their substantive due process and equal protection rights. In the appeal on the merits below, they added a claim that the failure to provide a hearing to review a parent's refusal of consent violated their procedual due process rights.

Ms. Moe sought to represent a class of minors seeking to marry but prevented from doing so by lack of parental consent, Mr. Roe a class of persons seeking to marry such minors, and Ricardo Roe a class of infants born or about to be born to such minors. On appeal, Ricardo Roe's proposed class was modified to a subclass of infants already born. They also applied to certify a defendant class of town and city clerks.

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* Only Mrs. Moe's consent was needed because she was allegedly Maria's only surviving parent and because Raoul did not need parental consent, allegedly being eighteen years old.

In trial court, plaintiffs never specified whether their requests for consent were made when Ricardo Roe was conceived, or thereafter. Based on a normal gestation period of nine months, Ricardo Roe was conceived in November, 1978, when Ms. Moe was thirteen years, nine months old. Under DRL § 15-a, the validity of which plaintiffs have never challenged, they could not have married at that time even with parental consent.

In trial court, plaintiffs also never explicitly claimed that Maria was a mature or emancipated minor. Ms. Moe never claimed to be attending school, nor did she explain how Ricardo Roe was cared for while, or if, she was at school, although she was subject to the compulsory education laws. Family Court Act (FCA) § 712(b) (29A). At the outset of the action, plaintiffs alleged that they lived independently "as a family unit" supported by Mr. Roe and occasional household employment by Ms. Moe. Subsequently, however, plaintiffs moved in with Mrs. Roe, Mr. Roe's mother. Although certain papers alleged that they paid rent to Mrs. Roe, other papers omit that claim. In none of their papers did plaintiffs indicate how much rent they paid or what proportion that was of Mrs. Roe's rent, nor did they indicate whether they maintained a separate household (in terms of living, eating, and financial arrangements) within Mrs. Roe's apartment.

Plaintiffs "have decided not to appeal here." Petition for Certiorari, p. 1 n."*".

C. Intervenors Cristina Coe and Pedro Doe

Cristina Coe and Pedro Doe moved to intervene under pseudonyms as plaintiffs and as additional repre-

sentatives of the class of minors and persons who wish to marry them. Cristina Coe allegedly was born on October 19, 1965, Pedro Doe on May 9, 1964, and their son, "Daniel Doe", in August, 1981. Assuming a normal gestation period of nine months, Daniel Doe was conceived a few weeks subsequent to Ms. Coe's fifteenth birthday.

Like the plaintiffs, Ms. Coe and Mr. Doe asserted that they wished to marry for several reasons, including the legitimization of Daniel Doe, but could not do so because Ms. Coe had been unable to obtain the requisite parental consent.* Indeed, Ms. Coe alleged that she was abandoned by Mrs. Coe, her mother, and did not even know her whereabouts. Intervenors raised the same constitutional claims as plaintiffs.

In trial court, Ms. Coe never explicitly claimed to be a mature or emancipated minor. Although subject to the compulsory education laws, she apparently did not attend school. Ms. Coe and Mr. Doe never lived together as an independent family unit. Rather, they admitted that they lived with Mr. Doe's father, stepmother, and stepsiblings and shared the household chores. They claimed to eat separately from other members of the household and to pay for their lodging out of Mr. Doe's earnings, but failed to state how much rent they paid or what proportion that was of the senior Mr. Doe's rent.

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* Only Mrs. Coe's consent was needed because she was allegedly Ms. Coe's custodial parent and because Mr. Doe's parents allegedly had consented.

Reasons for Granting the Conditional Cross-Petition

POINT I

Review should be granted of the novel rulings below that plaintiffs and intervenors could conceal their identities from the State defendant, thus preventing the State defendant from preparing a full defense as to class certification and on the merits which might have avoided constitutional questions.

Review should be granted on the cross-petition of the novel and important question of whether a plaintiff can conceal his or her identity from the defendant where the defendant objects and where the information is reasonably necessary for a defense which might resolve the case without deciding constitutional issues.

In criminal law, the right to know one's accuser is of constitutional dimension. U.S. Const. Am. VI. In civil cases as well, there is a strong public policy for "appris[ing] the parties of their opponents," *Doe* v. *Rostker,* 89 F.R.D. 158, 160 (N.D. Cal. 1981), and allowing defendants to test the *bona fides* of plaintiffs and their claims, *see Buxton* v. *Ullman,* 147 Conn. 48, 156 A.2d 508, 514 (1959), *app. dismd. sub nom. Poe* v. *Ullman,* 367 U.S. 497 (1961). Disclosure also avoids technical problems such as "potential inability to fix *res judicata.*" *Doe* v. *Rostker, supra,* 89 F.R.D. at 162.

Concern for privacy *vis-a-vis* the public does not justify total anonymity even in "public interest" civil litigation, nor does fear of well-founded prosecution for crime

justify concealing plaintiffs' identities. *See Doe* v. *Plyler*, 458 F. Supp. 569, 572 (E.D. Tex. 1978), *aff'd*, 628 F.2d 448 (5 Cir. 1980), *prob. juris. noted*, 451 U.S. 968 (1981). Indeed, our research fails to show a single case in which the attorney-client privilege has been allowed to conceal the identity of a plaintiff from the defendant he has sued. *See* Annotation, "Disclosure of Name, Identity, Address, Occupation, or Business of Client as Violation of Attorney-Client Privilege", 16 A.L.R. 3d 1047, 1050-6 (1967). The only case found by the parties in the courts below where defendants did not know the plaintiffs' identities is *Roe* v. *Ingraham*, 364 F. Supp. 536, 541 n.7 (S.D.N.Y 1973), *rev'd on other gds. sub nom. Whalen* v. *Roe*, 429 U.S. 589 (1977). In *Ingraham*, it appears that the challenge was only directed to establishing that plaintiffs were real people, not to learning their names. In *Doe* v. *Poelker*, 497 F.2d 1013 (8 Cir. 1974), *on remand*, 515 F.2d 541 (8 Cir. 1975), *rev'd*, 432 U.S. 519 (1977) (*per curiam*), which the plaintiffs and intervenors also cited below as a similar example, the plaintiff's identity was initially unknown to defendants. 497 F.2d at 1065 n.2. By the time of trial her identity was disclosed to defendants and testimony was taken about her personal affairs. 515 F.2d at 542-3. Moreover, this Court held that while plaintiff's legal theories could be *rejected* as a matter of law, based on such facts as had been established or pled, there were relevant factual disputes, as to her affairs and other matters, which would have to be resolved before relief could be *granted*. 432 U.S. at 519-20 & n.1.

The rulings below of the district court, affirmed by the court of appeals, that plaintiffs and intervenors could proceed under pseudonyms, are, on the facts, consistent with

Poelker, since judgment was ultimately entered against plaintiffs as a matter of law in both cases. But the State defendant has consistently asserted that the true identities of the plaintiffs and intervenors were highly relevant at an earlier stage of the litigation. Their trial court claim was that mature minors have a constitutional right to marry without parental consent. But that claim is predicated on an assertion supported by conflicting allegations as to their maturity and hearsay factual assertions that the girls' mothers refused to consent. If Ms. Moe and Ms. Coe were not mature, then they concededly had no constitutional right to marry. If the mothers did consent, plaintiffs and intervenors could have married under DRL § 15.

Without knowledge of their true identities, the State defendant was unable to verify any of their factual allegations. For instance, the State defendant wanted to interview the parents of the plaintiffs and the intervenors as to whether and why they refused consent and to seek evidence from neighbors, employers, teachers and family as to their independence and maturity. Such facts were relevant to the standing of plaintiffs and intervenors to raise constitutional claims on their behalves or as class representatives. Their identities had to be disclosed so that State defendant could prepare a full defense on the class certification issue and on the merits of plaintiffs' summary judgment motion. The failure to disclose entitled State defendant to dismissal without reaching the merits. *See Adickes* v. *H.S. Kress & Co.*, 398 U.S. 144, 160-1 (1970).

In *H.L.* v. *Matheson*, 450 U.S. 398 (1981), the minor plaintiff challenged a statute requiring notice to her parents of a proposed abortion. The Court reviewed her plead-

ings and the trial testimony. On finding that she had failed to claim or establish maturity, the Court narrowed the constitutional question for review to what rights did she have as a non-mature minor. 450 U.S. at 405-7. In the present case, plaintiffs and intervenors conceded that only mature minors would even arguably have a right to marry without parental consent. Thus, a finding of lack of maturity would have mooted any need to reach the constitutional issues. Under the Court's prudential rules, the non-constitutional issues should have been resolved first, even though the courts below went on to uphold the statute's constitutionality. *See New York City Transit Authority* v. *Beazer*, 440 U.S. 568, 582 & n.21 (1979).

Allowing plaintiffs to proceed under pseudonyms without disclosing their identities clashed with strong public policy. It presents a novel issue, arguably at odds with this Court's rulings in analogous cases. Resolution of the question in favor of State defendant may allow the Court here, and other courts in future pseudonymous actions, to determine the proceedings without unnecessarily deciding constitutional questions. Accordingly, review should be granted.

POINT II

Review should be granted of the rulings below denying abstention because the statute in question contains relevant, major ambiguities under New York case law, one of which has been identified by New York's highest court and another by a trial court.

The New York Court of Appeals has found DRL § 15 ambiguous, noting that it is not clear whether a non-parent in whose custody a parent leaves his or her child may qualify as a "guardian" for purposes of consenting to marriage, even in the absence of a court appointment. *Matter of Bennett* v. *Jeffreys*, 40 N.Y.2d 543, 551 (1976). *Cf.* Education Law § 3212 (McKinney 1981). Assuming *arguendo* that Mrs. Coe did not simply desert her daughter in violation of the criminal law, see pp. 7-8, *supra*, then the persons in whose care Ms. Coe was left possibly may be able to consent to her marriage under the statute. Accordingly, abstention was proper under *Railroad Commission* v. *Pullman Co.*, 312 U.S. 496 (1941).

There is also an ambiguity under DRL § 15 as to when a court may appoint a guardian. On the one hand, the statute has been read to bar appointment of a guardian who will consent to the child's marriage if the parents of an infant refuse. 1973 Op. Atty. Gen. 144. On the other hand, a distinguished member of the Surrogate's Court has held that DRL § 15 would allow the court to grant letters of guardianship for the purpose of consenting to marriage if the parents are not available and the judge is satisfied that the infant's best interests will be promoted thereby. *Matter of Rivera*, 109 Misc. 2d 501, 502 (Bronx

Surr. 1981); *Matter of Rugovac*, 77 Misc. 2d 659, 661 (Bronx Surr. 1974). But no New York court has squarely decided the question in a case granting permission to marry. In the present case, Mrs. Moe is said to be available, but Mrs. Coe's whereabouts are unknown. If *Rugovac* and *Rivera* are correct, it would seem that a guardian could be sought to consent to Cristina's marriage. The district court's holding that the Second Circuit's decision with respect to Ms. Moe barred *Pullman* abstention with respect to Ms. Coe, 533 F. Supp. at 626-7 (S.D.N..Y 1981), ignored the factual difference in the circumstances to which the statute was being applied.

Moreover, the first court of appeals panel committed a serious error in refusing to acknowledge the tenability of three alternative constructions of DRL § 15. 635 F.2d at 1048. As the district court had recognized, those readings mandated *Pullman* abstention since they would have deferred construction of an ambiguous statute to the State courts and avoided the need to decide the constitutional issues.

First, it is not clear whether the parent's denial of consent under DRL § 15(2) can be arbitrary or if it must be in the best interests of the child, as must be the grant of consent under DRL § 15(3). The court below held that the best interests standard could not be read in since child custody was not involved and the statute did not mention best interests. 635 F.2d at 1049. But, in fact, the Surrogate in *Rugovac* and *Rivera* held and the Court of Appeals in *Bennett* implied that best interests analysis is applicable. Furthermore, custody *was* involved, for marriage has traditionally involved a change in child custody, once a prop-

erty or chattel transfer from parent or guardian to spouse, now a release from parental custody to self-determination. *See* Katz, "Foster Parents Versus Agencies: A Case Study in the Judicial Application of the 'Best Interests of the Child Doctrine' ", 65 Mich. L. Rev. 145, 151 (1966). Moreover, the best interests standard has been applied where child custody is not involved and where the statute does not refer to best interests. *E.g., Skagen* v. *New York City Employees' Retirement System*, 108 Misc. 2d 448, 497 (N.Y. Co. Sup. 1981); *Matter of Jean C.*, N.Y.L.J. Nov. 25, 1980, p. 13, col. 2 (Queens Fam.), *aff'd*, — A.D. 2d —, 447 N.Y.S. 2d 524, N.Y.L.J. Feb. 25, 1982, p. 14, col. 6 (2d. Dep't).

Second, the court below rejected the possibility that the New York courts might read a mature or emancipated minor exception into DRL § 15 on the grounds that children cannot unilaterally emancipate themselves in New York, that New York does not recognize emancipation for youths under sixteen years old, and that emancipation generally applies only where matters of public health and safety are involved. 635 F.2d at 1049. In fact, the New York courts are divided as to whether minors can unilaterally emancipate themselves. *See* cases cited in "Recommendations of the Law Revision Commission to the 1980 Legislature Relating to Support Obligations as Affected by the Independence of Children and by Unconstitutional Sex Distinctions", *1980 McKinney Sess. L.* 1614, 1616-7. Furthermore, it is arguable that the acts of Mrs. Moe and Mrs. Coe were intended to emancipate their children. Moreover, New York courts have afforded children of fifteen adult treatment without a statute. *E.g., Matter of*

Tameeka Charlene W., N.Y.L.J. Sept. 8, 1981, p. 14, col. 6 (Bronx Surr.); *Matter of Rogers*, 36 Misc. 2d 680 (Schuyler Fam. 1962). Finally, the marriage of females of child-bearing age is a public health concern. *Cf., Michael M.* v. *Superior Court of Sonoma County*, 540 U.S. 464 (1981).

Third, it is arguable that under the circumstances of these cases, a requirement of reasonableness would be read into DRL § 15. The New York Court of Appeals has held that the State's courts will not allow themselves to be used for the furtherance of crime, *Carr* v. *Hoy*, 2 N.Y.2d 185, 188 (1957), and will refuse to enforce a statute where to do so would permit the commission of a crime affecting the welfare of a child, *Matter of Jacqueline F.*, 47 N.Y.2d 215, 220 (1979). Thus, when enforcement of a statute would further a crime affecting a minor, whether or not the underlying statute is clear, the New York courts may refuse to enforce it. Specifically, in the present case, Ms. Moe's mother allegedly denied her consent to marry in order to continue to collect public assistance for the plaintiff although she had left Mrs. Moe's household. Under New York Social Services Law § 145, collecting or abetting another to collect public assistance in that manner is a crime. Likewise, Mrs. Coe has allegedly failed to insure support, care, and reasonable diligence in supervision for her daughter. Non-support and endangering the welfare of a minor are also crimes. Penal Law §§ 260.05-.10. In order to prosecute these crimes, intent would have to be proven by, in part, reviewing the reasonableness of their acts for withholding consent. Not reviewing the reasons would effectively bar prosecution.

The court below cited *Berger* v. *Adornato*, 76 Misc. 2d 122 (Onondaga Co. Sup. 1973), in holding that a parent's reasons for withholding consent to marriage were beyond

the scrutiny of New York courts. 635 F.2d at 1048. But the *Berger* court did in fact scrutinize the parents' reasons, just as the *Rugovac* court scrutinized the reasons of the proposed parent-substitute.

Moreover, none of the cases declining to second guess a parent's denial of consent have involved allegations of crime by the parent affecting the child's welfare. Significantly, an improper grant of consent has been found to be a crime and the parent's reasons reviewable. *People* v. *Benu*, 87 Misc. 2d 139, 142-4 (Kings Co. Crim. 1976). Under the circumstances alleged in this case, the New York courts might well decline to become *in particeps crimens, cf., Olmstead* v. *United States*, 277 U.S. 438, 471, 484-5 (1928) (*Brandeis*, J., dissenting), and read in a requirement of reasonableness.

Conclusion

For the reasons stated, if a Writ of Certiorari issues on the petition in Docket No. 81-6511, a Writ should issue on this conditional cross-petition.

Dated: New York, New York
May 13, 1982

Respectfully submitted,

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Memorandum Opinion

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

80 Civ. 1577

MARIA MOE, RAOUL ROE, and RICARDO ROE, an infant, by his father RAOUL ROE, on behalf of themselves and all other persons similarly situated,

Plaintiffs,

against

DAVID DINKINS, individually and as City Clerk of New York City, on behalf of himself and all town and city clerks in New York State, and DAVID AXELROD, individually and as New York State Commissioner of Health,

Defendants.

APPEARANCES

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CONSTANCE BAKER MOTLEY, D. J.

Defendants have moved for an order, pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure, dismissing the complaint. Plaintiffs have moved for an order, pursuant to Rule 23(c)(1) of the Federal Rules of Civil Procedure, determining that this action may be maintained as a class action with a plaintiff and a defendant class pursuant to Rules 23(a) and 23(b)(2) of the Federal Rules of Civil Procedure. For the reasons stated below, the court concludes that the complaint should be dismissed without prejudice, since abstention is mandatory in this action.

Plaintiffs in this action seek a judgment declaring unconstitutional, and enjoining enforcement of, the parental consent requirements of New York Domestic Relations Law §§ 15.2 & 15.3. Under New York law, all persons who in-

tend to be married in the state of New York must obtain a marriage license from a town or city clerk in the state. N.Y. Dom. Rel. Law § 13. Section 15.2 provides that if it appears that the male applicant for a marriage license is under eighteen years of age and is not under sixteen years of age, or that the female applicant is under the age of eighteen years and is not under fourteen years of age, "then the town or city clerk before he shall issue a license shall require the written consent to the marriage from both parents of the minor or minors or such as shall then be living, or if the parents of both are dead, then the written consent of the guardian or guardians of such minor or minors." Section 15.2 further requires that "[t]he parents, guardians or other persons whose consent it shall be necessary to obtain and file with the town or city clerk before the license shall issue shall personally appear and acknowledge or execute the same before the town or city clerk, or some other officer authorized to administer oaths and take acknowledgments." Section 15.3 provides that if it appears that the female applicant is under the age of sixteen years, the town or city clerk shall require, in addition to the consents provided in Section 15.2, the written approval and consent of a justice of the supreme court or of a judge of the family court. Section 15.3 further provides that any town or city clerk who issues a marriage license without first requiring the approval and consents provided for by Sections 15.2 and 15.3 shall be guilty of a misdemeanor.

Plaintiffs allege that the New York statute requires parental consent to the marriage of minors, in violation of plaintiffs' rights under the First, Fifth, Ninth, and Four-

teenth Amendments to the United States Constitution. In particular, plaintiffs allege that the statute constitutes an absolute veto power over the decision to marry of minors and their prospective spouses, without establishing any standard for the withholding of consent by parents. Plaintiffs allege, moreover, that the statute prevents those minors and their prospective spouses with children from establishing legitimate parent-child relationships through marriage.

Defendants argue that the *Pullman* doctrine of abstention requires dismissal of plaintiffs' complaint. The Second Circuit summarized the standards of the *Pullman* doctrine in *Winters* v. *Lavine*, 574 F.2d 46, 69 (2d Cir. 1978):

> While a litigant wishing to vindicate his federal constitutional rights has a "right to have [those claims] adjudicated by a federal tribunal," *McRedmond* v. *Wilson*, 533 F.2d 757, 760 (2d Cir. 1976), it is equally well-understood that a federal court presented with such claims will under certain circumstances have a duty to postpone consideration of the federal constitutional claims until the state courts have had an opportunity to consider other issues inherent in the lawsuit. The seminal case in the area is *Railroad Commission* v. *Pullman Co.*, 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941). "There [, the Supreme] Court held that in special circumstances, where resolution of a federal constitutional issue is controlled by the interpretation of an unclear or complex state statute that is susceptible to a construction which would avoid or modify the necessity of a constitutional adjudication, the federal court should defer to the state court's interpretation of its own statute." *McRedmond* v. *Wilson*, *supra*, 533 F.2d at 760. We have recognized that the significant policies which are advanced by application of the *Pullman* doctrine are "the avoidance of federal-

> state friction, the recognition that regardless of a federal court's construction, the state's highest court is the final expositor of that state's law, and the possibility that the federal [constitutional] question may be avoided." *Id.* at 761. The cases in which application of the *Pullman* doctrine is appropriate are those in which these formidable policy factors "outweigh the duplication of effort and added expense and delay heaped upon the plaintiff by shuttling him between state and federal courts." *Id.* We also explained in *McRedmond* that there are "three essential conditions for invocation of the doctrine of abstention [: (1)] that the state statute be unclear or the issue of state law be uncertain, [(2)] that resolution of the federal issue depend upon the interpretation to be given to the state law, and [(3)] that the state law be susceptible of an interpretation that would avoid or modify the federal constitutional issue." *Id.* (citations omitted).

Accord, Pharmaceutical Society of the State of New York, Inc. v. *Lefkowitz*, 586 F.2d 953, 955-56 (2d Cir. 1978). *See generally Reid* v. *Board of Education*, 453 F.2d 238, 240-42 (2d Cir. 1971). *See also Wright* v. *McMann*, 387 F.2d 519, 525 (2d Cir. 1967) ("it is reasonable to conclude that cases involving vital questions of civil rights are the least likely candidates for abstention").

In the case at hand, the court must first consider whether Sections 15.2 and 15.3 are unclear. Plaintiffs argue that Sections 15.2 and 15.3 are clear and unambiguous, and that under state law the two sections must be read: 1) as failing to provide a standard for the granting or withholding of parental consent, and 2) as providing that the parental consent requirement cannot be dispensed with. Plaintiffs assert that Sections 15.2 and 15.3 have been definitively interpreted in a number of state cases. A close analysis of

the cases relied upon by plaintiffs, however, suggests that these cases are far from "a definitive exposition of state law." *Connecticut State Federation of Teachers* v. *Board of Education Members*, 538 F.2d 471, 485 (2d Cir. 1976).

Thus, for example, in *Carr* v. *Carr*, 104 N.Y.S.2d 269 (Sup. Ct. Chautauqua County 1951), a state court examined the validity of a Michigan marriage by a male of the age of twenty years. In dictum, the court indicated that under Section 15, which then applied to males under twenty-one years of age, the consent of parents was a prerequisite to a valid marriage, if performed in the state of New York. *Id.* at 270, 271. In a more recent case, *Berger* v. *Adornato*, 76 Misc. 2d 122 (Sup. Ct. Onondaga County 1973), a state court held that Section 15.2, as it was then written, violated the Equal Protection Clause of the Fourteenth Amendment because it established a different age standard for marriage between males and females. In ruling the statute unconstitutional as applied to the twenty-old male petitioner, the court characterized Section 15.2 in dicta:

> There are no safeguards, guidelines, limitations or assurances that the parents will perform their responsibility within the framework of the allegedly valid State objective. There is no provision for judicial review, since the authority of the parents is unrestricted and therefore, final.
>
> Thus, the parents may use their authority to act on behalf of the State interest. Or they may do whatever they please. . . .

Id. at 124. Finally, in *In re Powers*, 96 Misc. 2d 183 (Fam. Ct. Yates County 1978), a state Family Court considered a petition seeking the court's review of a parent's refusal to consent, or seeking to dispense with the written parental

consent requirement. The court dismissed the petition on the ground that the Family Court lacked subject matter jurisdiction:

> As to the mother's refusal to give her written consent to license the marriage of her 17-year-old son, even were it shown to be unreasonably withheld or refused, the Family Court has no subject matter jurisdiction to review a parent's refusal or to dispense with the written parental consent required by the statute before a town or city clerk may issue a marriage license to a person under 18 years of age.

Id. at 184.

The court is of the view that these state cases leave Sections 15.2 and 15.3 unclear for a number of reasons. With respect to the *Carr* and *Berger* cases, the state court's discussions of whether the parental consent requirement can be dispensed with and whether a parent's refusal is final and not subject to judicial review were clearly dicta. In both cases the lower state courts were presented with issues which did not require an analysis of possible exceptions or qualifications to the parental consent requirement. With respect to the *Powers* case, it is clear that the Family Court simply found that it lacked subject matter jurisdiction. The *Powers* court carefully refrained from suggesting that other state courts would lack subject matter jurisdiction—that is, the Family Court in *Powers* did not indicate that a parent's refusal was unreviewable by all courts or that Sections 15.2 and 15.3 precluded all courts from dispensing with the written parental consent requirement. *See also Connecticut State Federation of Teachers* v. *Board of Education Members, supra,* 538 F.2d at 485 (effect of state lower court decisions).

It should be noted, moreover, that the *Carr*, *Berger*, and *Powers* opinions, insofar as they discuss the reviewability of and exceptions to parental consent under Sections 15.2 and 15.3, preceded the Supreme Court's decision in *Bellotti* v. *Baird*, 61 L.Ed 2d 797 (1979). In light of the Court's opinions in *Bellotti*, it is quite possible that a state court would interpret Sections 15.2 and 15.3 differently from the interpretations given in *Carr*, *Berger*, and *Powers*.

In *Bellotti*, Justice Powell concluded, in an opinion joined by three other Justices, that "if the State decides to require a pregnant minor to obtain one or both parents' consent to an abortion, it also must provide an alternative procedure whereby authorization for the abortion can be obtained." *Id.* at 813 [footnote omitted]. The analogy between *Bellotti* and the case at hand is too obvious to be ignored. While the Justice Powell opinion in *Bellotti* at one point does appear to hint at a distinction between marriage and abortion, it cannot be said that *Bellotti's* requirement of an alternative procedure is wholly inapplicable to the case at hand. Accordingly, a state court faced today with the task of interpreting Sections 15.2 and 15.3 might choose, not unreasonably, to interpret these sections as implicitly providing an alternative procedure.

In summary, Sections 15.2 and 15.3 are unclear in a number of respects. The statute may be interpreted by the state courts as implicitly providing a standard for the granting or withholding of parental consent, and as implicitly allowing an alternative procedure for judicial review of a withholding of consent. The statute may also be interpreted as implicitly allowing a court to dispense with the parental consent requirement under certain circumstances. While the language of Sections 15.2 and 15.3

makes no explicit reference to judicial review or dispensation with the consent requirement, the absence of such references will not itself render the sections clear and unambiguous. As discussed above, the state courts which have considered Sections 15.2 and 15.3 have not yet squarely addressed the issues of interpretation presented in the case at hand.

Next, the court must examine whether the resolution of the constitutional issues depends upon the interpretation to be given to the state law. While plaintiffs have raised a number of constitutional theories in their challenge to Sections 15.2 and 15.3, two theories in particular are critical to an analysis of the abstention question. First, a resolution of the constitutional issues would require the court to apply the Supreme Court's decision in *Zablocki* v. *Redhail*, 434 U.S. 374 (1978), to the case at hand. In *Zablocki*, the Court held that when a statutory classification significantly interferes with the exercise of a fundamental right, such as the right to marry, it cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests. *Id.* at 388. In the case at hand, it is beyond dispute that Sections 15.2 and 15.3 significantly interfere with the exercise of plaintiffs' right to marry. The critical question is, thus, whether these sections are supported by sufficiently important state interests and is closely tailored to effectuate those interests. This inquiry, in turn, depends upon whether Sections 15.2 and 15.3 require parental consent in all instances, and whether a parent's authority to withhold consent is absolute and not subject to judicial review. Obviously, the interpretation to be given Sections 15.2 and 15.3 will effect the court's deter-

mination of whether the provisions are closely tailored to effectuate only sufficiently important state interests.

Second, a resolution of the constitutional issues would require the court to apply the Supreme Court's decisions in *Planned Parenthood* v. *Danforth*, 428 U.S. 52 (1976), and *Bellotti* v. *Baird*, 61 L.Ed 2d 797 (1979), to the case at hand. In *Danforth*, the Court held that the State may not impose a blanket provision requiring the consent of a parent as a condition for abortion of an unmarried minor during the first twelve weeks of her pregnancy. 428 U.S. at 74. Thus it is inappropriate to give a third party an absolute, and possibly arbitrary, veto over the decision of the physician and his patient to terminate the patient's pregnancy, regardless of the reason for withholding consent. *Id.* In *Bellotti*, Justice Powell relied upon *Danforth* in concluding that if the State decides to require a pregnant minor to obtain one or both parents' consent to an abortion, it also must provide an alternative procedure whereby authorization for the abortion can be obtained. 61 L.Ed 2d at 813. In such a proceeding a minor is entitled to show that she is mature enough and well enough informed to make her abortion decision, in consultation with her physician, independently of her parents' wishes. *Id.* at 813-14. "In sum, the procedure must ensure that the provision requiring parental consent does not in fact amount to the 'absolute, and possibly arbitrary, veto' that was found impermissible in *Danforth*." *Id.* at 814. To the extent, then, that *Danforth* and *Bellotti* may be relevant to the case at hand, the resolution of the constitutional issues depends upon whether Sections 15.2 and 15.3 are interpreted as giving parents an absolute, and possibly arbitrary, veto over a minor's decision to marry.

In short, resolution of both constitutional theories discussed above depends upon the interpretation to be given to Sections 15.2 and 15.3.

Finally, the court must examine whether Sections 15.2 and 15.3 are susceptible of an interpretation that would avoid or modify the federal constitutional issue. The court is of the view that Sections 15.2 and 15.3 are susceptible of an interpretation that would modify the federal constitutional issue. In particular, the court agrees with defendants that the provisions are susceptible to one or more interpretations that would modify the federal constitutional issues. First, Sections 15.2 and 15.3 may be interpreted as implicity providing an exception for minors who have emancipated themselves or who have otherwise shown mature judgment. Such an interpretation would be consistent with "emancipated minor" exceptions in a variety of areas of New York law. *See generally* Report of the Law Revision Commission for 1980, 1980 Leg. Doc. No. 65, at A-42 to A-46. A plausible interpretation of Sections 15.2 and 15.3 is that "emancipated minors" may seek judicial relief from the parental consent requirement. Second, Sections 15.2 and 15.3 may be interpreted as requiring that a parent's granting or withholding of consent be based on the child's best interests. Accordingly, Sections 15.2 and 15.3 may be interpreted as allowing a minor to have a state court review a parent's withholding of consent where the parent's decision is in bad faith or contrary to the child's best interest. In such circumstances, a court could decide, upon consideration of the circumstances and the minor's maturity, to dispense with the parental consent requirement.

Of course, the court expresses no view as to the proper interpretation of Sections 15.2 and 15.3. The court merely

notes that the above interpretations would not be unreasonable or necessarily contrary to the language of the statute. Sections 15.2 and 15.3 have been construed in some respects, but not in those respects critical to this court's constitutional inquiry.

In summary, the court concludes that the three essential conditions for invocation of the doctrine of abstention are met in the case at hand. The policy factors advanced by application of the *Pullman* doctrine here "outweigh the duplication of effort and added expense and delay heaped upon the plaintiff by shuttling him between state and federal courts." *McRedmond* v. *Wilson, supra,* 533 F.2d at 761. While New York unfortunately does not have a certification procedure for expedited resolution of these issues of interpretation of New York law, this fact alone does not preclude invocation of the doctrine of abstention. While plaintiffs must bring a state declaratory judgment proceeding or a proceeding under Article 78 of the New York Civil Practice Law and Rules, as well as appropriate appeals if necessary, it may safely be assumed that the state courts will proceed promptly in a case raising such important issues as the case at hand.

Plaintiffs have suggested that they have no state remedies by which to seek an interpretation or review of Sections 15.2 and 15.3. This argument is without support. Plaintiffs may bring a proceeding under Article 78 of the Civil Practice Law and Rules. On applying for a license and being refused, plaintiffs may seek a writ of mandamus under Article 78 against the Clerk of New York City. If the state court finds relief to be appropriate, it may order that a marriage license be issued by the city clerk. *See Berger* v. *Adornato, supra. See also Friedrich* v. *Katz,* 73

Misc. 2d 663 (Sup. Ct. N.Y. County 1973). While plaintiffs in the case at hand do not intend to challenge the constitutionality of Sections 15.2 and 15.3 in the state courts, it should be noted that under New York law an Article 78 proceeding may not be used to test the constitutionality of a legislative enactment as distinct from the counstitutionality of its application. *Board of Eduction* v. *Gootnick,* 49 N.Y.2d 683 (1980). Should a state court find the case at hand to be inappropriate under Article 78, the matter may be converted to a declaratory judgment action. *See id.* In any case, state remedies are available for plaintiffs to seek an interpretation of Sections 15.2 and 15.3 and, if they so choose, to challenge the constitutionality of the provisions and obtain appropriate relief.

The final issue before the court is the proper disposition of this action, given the court's decision that abstention is appropriate. It is well-established that while a party must inform the state courts what his federal claims are, so that the state statute may be construed "in light of" those claims, a party is not compelled to litigate his federal claims in the state courts. *England* v. *Louisiana State Board of Medical Examiners,* 375 U.S. 411, 420 (1964). Plaintiffs have informed the court of their intention to preserve their right to litigate their federal claims fully in the federal courts.

As a general rule, it is better practice to retain jurisdiction rather than to dismiss in abstention cases. *Zwicker* v. *Koota,* 389 U.S. 241, 244 n.4 (1967). However, the Supreme Court has made clear that it is not improper to dismiss on grounds of abstention, provided that the dismissal is without prejudice to the right of the plaintiffs to

litigate their federal claims in federal court at the conclusion of the state proceedings. *American Trial Lawyers Assoc.* v. *New Jersey Supreme Court*, 409 U.S. 467 (1973); *see Yesterday's Children* v. *Kennedy*, 569 F.2d 431 (7th Cir. 1977), *cert. denied*, 437 U.S. 904 (1978).

In the case at hand, the court is of the view that it is slightly preferable for the court to dismiss the action without prejudice to the right of the plaintiffs to litigate their federal claims in federal court at the conclusion of the state proceedings, rather than retaining jurisdiction. Despite plaintiffs' intention to preserve their right to litigate their federal claims fully in federal court, there is a serious possibility that plaintiffs will receive full relief in the state courts. Accordingly, dismissal without prejudice appears to be the preferable course in terms of judicial economy.

For the reasons stated above, the court concludes that defendants' motions to dismiss the complaint, without prejudice, must be granted. The court reaches this conclusion solely on the grounds of abstention, without considering defendants' other arguments for dismissal. The court need not determine whether this action may be maintained as a class action.

Dated: New York, New York
July 10, 1980

So Ordered.

Constance Baker Motley
U. S. D. J.